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In the Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL COMMUNICATIONS COMMISSION, APPELLANT

v.

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether 47 U.S.C. 399, which prohibits "editorializing" by noncommercial educational broadcasting stations that receive grants from the Corporation for Public Broadcasting, violates the First Amendment.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Pacifica Foundation and Henry Waxman were party plaintiffs in the district court.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court on the constitutional question (82-912 J.S. App. 1a-20a) is reported at 547 F. Supp. 379. The order denying attorneys' fees (App. C, *infra*, 6a-18a) and the order denying appellees' motion to alter or amend that order (App. A, *infra*, 1a-3a) are unreported.

JURISDICTION

The judgment of the district court (App. A, *infra*, 1a-3a) was entered on August 25, 1983. The notice of appeal (App. E, *infra*, 19a-20a) was filed on September 6, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

STATEMENT

1. On August 5, 1982, the district court issued a judgment in this case that (1) declared unconstitutional the provision of 47 U.S.C. (Supp. V) 399 prohibiting editorializing by certain public broadcasting stations, (2) enjoined the Federal Communications Commission and others from enforcing that provision, and (3) provided that appellees "shall recover their costs and reasonable attorneys' fees" (App. B, *infra*, 4a-5a). That judgment was entered on August 6, 1982. On August 16, 1982, the Commission filed what was styled a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) "on the ground that the award to plaintiffs of reasonable attorneys' fees is barred by sovereign immunity because the award was not made in accord with the procedures or limitations of the Equal Access to Justice Act, 28 U.S.C. § 2412" (82-912 Mot. to Dis. App. 3a-4a). Appellees opposed this motion. On September 3, 1982, the Commission filed a notice of appeal from the district court's judgment of August 5, 1982 (82-912 J.S. App. 23a-24a). Justice Rehnquist subsequently extended the time for docketing an appeal until December 1, 1982, and the appeal was docketed on that date as No. 82-912. This Court's jurisdiction was invoked under 28 U.S.C. 1252, which provides in pertinent part:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies * * * is a party.

In the interim, the district court addressed the pleadings concerning attorneys' fees. The district court declined to treat the Commission's August 16 motion as a motion under Fed. R. Civ. P. 59(e). A minute entry entered on November 1, 1982, by the clerk of the court, reports the following proceedings (App. D, *infra*, 18a):

> The Court Orders that its previous award of attorney fees is stricken from the judgment. Plaintiffs' opposition to the defendant [sic] motion to amend judgment is deemed a motion for attorney fees and the defendant's motion to amend the judgment is deemed the opposition to a motion for attorney fees.
>
> The motion for an award of attorney fees is argued to the Court. The Court takes the motion under submission.

2. Appellees moved to dismiss the Commission's appeal in No. 82-912, arguing that notice of appeal had not been timely filed. Appellees contended (Mot. to Dis. 11-12) that the Commission's August 16 motion regarding attorneys' fees was a "motion for reconsideration" that "suspended the finality of the District Court's judgment" and terminated the running of the time for appeal. They appeared to argue (*ibid.*) that the reported proceedings of November 1, 1982, constituted a final disposition of this case and that the time for appeal ran from that date. They therefore concluded (*id.* at 12-13) that the notice of appeal filed on September 3 was premature and consequently of no effect (see *Griggs* v. *Provident Consumer Discount Co.*, No. 82-5082 (Nov. 29, 1982) (notice of appeal to court of appeals filed while timely Rule 59 motion is pending is a nullity)). And since another notice of appeal was not filed within 30 days

after November 1, appellees maintained (Mot. to Dis. 12-13) that appellate jurisdiction was lacking.

On February 28, 1983, this Court postponed further consideration of the question of jurisdiction in No. 82-912 to the hearing on the merits. Both the Commission and appellees have now filed briefs on the merits.

3. On July 11, 1983, after briefing and argument, the district court denied appellees' request for attorneys' fees (App. C, *infra*, 6a-17a). Nine days thereafter on July 20, 1983, appellees filed a timely motion under Fed. R. Civ. P. 59(e) to alter or amend the July 11 order (App. F, *infra*, 21a-25a), but on August 25, 1983, the district court entered an order denying that motion (App. A, *infra*, 1a-3a). On September 6, 1983, the Federal Communication Commission filed notice of appeal to this Court (App. E, *infra*, 19a-20a).

THE QUESTION IS SUBSTANTIAL

The purpose of this appeal is to ensure that the important question presented by the district court's decision on the merits of this case—whether 47 U.S.C. (Supp. V) 399 violates the First Amendment—does not escape review by this Court due to a procedural technicality. This constitutional question is now before the Court in No. 82-912 and has been fully briefed. However, the Court also has before it appellees' motion to dismiss that appeal on the ground that the notice of appeal was not timely filed. As previously noted, appellees contend that the Commission's August 16, 1982, motion regarding attorneys' fees "suspended the finality" of the prior order holding Section 399 unconstitutional (82-912 Mot. to Dis. 11-12) and rendered void the notice of appeal filed by the Commission while the question of attorneys' fees was

still pending (*id.* at 12-13). For the reasons explained at length in our briefs in No. 82-912, we strenuously disagree with appellees' contention (see Br. 1-2; Reply Memorandum 2-8). But if appellees are correct, it must follow that the finality of the district court order holding Section 399 unconstitutional remained suspended until that court settled the question of attorneys' fees with its order of August 25, 1983, denying appellees' timely motion under Fed. R. Civ. P. 59 (e) to alter or amend the district court's order of July 11, 1983, denying attorneys' fees.[1] We have consequently taken this appeal from that order.

Appellees seek to frustrate this Court's review of the district court's decision by suggesting (82-912 Mot. to Dis. 11-12) that the district court clerk's minute entry of November 1, 1982, constituted a final disposition of appellant's Rule 59 Motion and that appellant was therefore required to file notice of appeal within 30 days thereafter. Appellees' argument is patently incorrect. The minute entry of November 1, 1982, cannot possibly be the final order in this case because it did not dispose of the question of attorneys' fees but instead provided simply that the Court "takes the motion under submission" (App. D, *infra*, 18a).[2]

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[1] As appellees themselves have argued (see 82-912 Mot. to Dis. 11-12), a timely Rule 59(e) motion suspends the finality of a prior judgment. See Sup. Ct. R. 11.3; cf. Fed. R. App. P. 4(a)(4). Unlike the Commission's August 16, 1982, motion regarding attorneys' fees, which was completely collateral to the district court's prior order holding 47 U.S.C. (Supp. V) 399 unconstitutional (see 82-912 Appellant's Reply Memorandum 7-8), appellees' July 20, 1983, motion was a true motion to alter or amend the district court's July 11 order denying attorneys' fees.

[2] Our understanding of the matter—that the judgment with respect to the merits was entered on August 6, 1982, and that

See *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 742 (1976).[3]

In sum, our position continues to be that the important question on the merits—the constitutional validity of Section 399—is properly before the Court in No. 82-912, which was correctly noticed and docketed as an "appeal * * * from an interlocutory or final judgment, decree or order"—that is, the decision of August 5, 1982—"holding an Act of Congress [Section 399] unconstitutional." 28 U.S.C. 1252. If, however, this Court should determine that the issue of the validity of Section 399 could not properly be raised until the district court finally decided the issue of attorneys' fees—on August 25, 1983—then this appeal becomes the proper case for the consideration of that question.

In order to avoid procedural complications, we respectfully suggest that this appeal be held until the Court passes on the question of its jurisdiction in No. 82-912. If the Court should decide that it has jurisdiction in that appeal, the government will move to

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the November 1, 1982 entry simply set the collateral attorneys' fees question for argument—is quite clearly shared by the district court in this case. In its final order of August 25, 1983, disposing of the attorneys' fees issue, that court stated: "Judgment was entered in this litigation on August 6, 1982. On November 1, 1982, the court heard oral argument of plaintiffs' timely application for an award of attorneys' fees under 28 U.S.C. § 2412(d)(1)(A). As indicated above [on July 11, 1983] the Court denied that application." App. A, *infra*, 1a.

[3] In *Liberty Mutual Insurance Co.*, an order was held not to be final because it did not dispose of all the plaintiffs' requests for relief, including their request for attorneys' fees (see 424 U.S. at 742). Here as well, plaintiffs' attorneys' fees request (82-912 J.A. 11) was left pending by the November 1, 1982, minute entry.

dismiss this appeal under Rule 53.2 of the Rules of this Court. If the Court should decide it does not have jurisdiction in No. 82-912, we ask that probable jurisdiction be noted in this appeal and that the briefs and arguments on the merits in No. 82-912—involving the identical case, the identical parties, and the identical constitutional issue—be deemed the relevant submissions in this case.

CONCLUSION

For the foregoing reasons and those set forth in our jurisdictional statement and brief in No. 82-912, if the appeal in No. 89-912 is dismissed, probable jurisdiction over this appeal should be noted, and the briefs and arguments on the merits of No. 82-912 should be deemed the relevant submissions in this case.

Respectfully submitted.

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OCTOBER 1983

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-79-1562-MML

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL., PLAINTIFFS

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

ORDER DENYING PLAINTIFFS' MOTION TO ALTER OR AMEND

On July 11, 1983 this Court denied plaintiffs' application for an award of attorneys' fees under 28 U.S.C. § 2412(d)(1)(A). On July 20, 1983 plaintiffs filed a motion pursuant to F.R.Civ.P. 59(e) to alter or amend the July 11, 1983 order. The Court has reviewed the papers filed and has determined that oral argument of this motion is not required. The Court, therefore, takes the motion off calendar for Monday, August 29, 1983. After careful consideration of the papers filed and of the applicable authorities, the Court denies plaintiffs' motion.

Judgment was entered in this litigation on August 6, 1982. On November 1, 1982 the court heard oral argument of plaintiffs' timely application for an award of attorneys' fees under 28 U.S.C. § 2412(d)(1)(A). As indicated above, the Court denied that application. Plaintiffs now raise a new and different

argument in support of their request for an award of attorneys' fees in this litigation. Plaintiffs contend that they are entitled to an award of attorneys' fees under 28 U.S.C. § 2412(b), a provision of the Equal Access to Justice Act entirely distinct from § 2412(d)(1)(A). Prior to the filing of the present motion plaintiffs had affirmatively represented to the Court that § 2412(b) was not at issue in this case.

Under these circumstances, the Court should not reach the merits of plaintiffs' motion. All of the arguments raised in the motion could have been raised in the original application for attorneys' fees. Section 2412(b) was in effect at the time plaintiffs' filed their original application. The interpretation of the statute put forward by plaintiffs had been discussed, albeit ultimately rejected, in published judicial decisions prior to the filing of the original application. *See United States v. Miscellaneous Pornographic Magazines*, 541 F.Supp. 122 (N.D. Ill. 1982). The case relied upon by plaintiffs, *Lauritzen v. Secretary of the Navy*, 546 F.Supp. 1221 (C.D. Cal. 1982) was published months before the Court issued its order denying plaintiffs' application.* There is no reason that the issues raised by the present motion could not have been raised in conjunction with the original application. The Court will not permit plaintiffs to raise such issues by means of a motion pursuant to F.R. Civ.P. 59(e). *See, Huff v. Metropolitan Life Ins. Co.*, 675 F.2d 119, 123 n.6 (6th Cir. 1982); *Morgan v.*

* The Court notes in this regard that plaintiffs were permitted to file supplemental papers in support of their application for an award of attorneys' fees on December 23, 1982, nearly two months after the publication of the *Lauritzen* decision. No mention of § 2412(b) was made in these supplemental papers.

O'Bryant, 671 F.2d 23, 26 (1st Cir.), *cert. denied*, 103 S.Ct. 62 (1982). *See also*, Local Rules of Practice for the United States District Court for the Central District of California, Rule 3.16. Thus, plaintiffs' application must be denied.

Even if the Court were to reach the merits of plaintiffs' application, however, the Court would deny the present motion. After careful consideration of the apposite authorities, the Court has determined that it would not follow the reasoning of the *Lauritzen* decision. Rather, the Court would adopt the reasoning set forth in *Venus v. Goodman*, 556 F.Supp. 514 (W.D. Wis. 1983) and *Miscellaneous Pornographic Magazines*, *supra*, and decline to read § 2412(b) to permit an award of attorneys' fees under these facts. Thus, even if plaintiffs had applied for an award of attorneys' fees under § 2412(b) in an appropriate manner, the Court would have denied plaintiffs' application.

IT IS SO ORERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: August 25, 1983

/s/ Malcolm M. Lucas
MALCOLM M. LUCAS
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-79-1562-MML

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL., PLAINTIFFS

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

SUMMARY JUDGMENT

This cause came on to be heard on motion of plaintiffs for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Court having considered all pleadings, memoranda, and declarations submitted herein, and having heard the arguments of counsel, and having given due deliberation to this matter,

IT IS ORDERED that plaintiffs' motion for summary judgment is hereby granted, and further

ORDERED, ADJUDGED and DECREED, that

1. The prohibition against editorializing contained in 47 U.S.C. § 399 is unconstitutional as a violation of the First Amendment to the United States Constitution, and is hereby declared null and void;

2. Defendant Federal Communications Commission and any of its agents, employees and other acting in

concert with it are hereby enjoined from forcing or executing the prohibition against editorializing contained in 47 U.S.C. § 399;

3. Plaintiffs shall recover their costs and reasonable attorneys' fees.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Judgment on counsel for all parties in this matter.

Dated: August 5, 1982

/s/ Malcolm M. Lucas
MALCOLM M. LUCAS
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV-79-1562-MML

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL., PLAINTIFFS

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

ORDER DENYING PLAINTIFFS' APPLICATION FOR AN AWARD OF ATTORNEYS' FEES

On August 6, 1982 this Court entered summary judgment in favor of plaintiffs. *League of Women Voters of California v. FCC*, 547 F.Supp. 379 (C.D. Cal. 1982). In the order granting summary judgment the Court indicated that plaintiffs were entitled to an award of costs and reasonable attorneys' fees. *Id.*, 577 F.Supp. at 388. Thereafter, defendant moved to alter or amend the judgment to delete the award of attorneys' fees. Plaintiffs opposed this motion and filed a timely application for an award of attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA"). Plaintiffs' application and defendant's motion came on for hearing before the Court, the Honorable Malcolm M. Lucas, District Judge, presiding, on November 1, 1982. At oral argument the Court indicated that the award of attorneys' fees was

inadvertently included in the August 6, 1982 order. Such an award was not appropriate in that plaintiffs had not applied for such an award at that time as required by 28 U.S.C. § 2412(d)(1)(B). The Court, therefore, orally ordered the award of attorneys' fees stricken from the judgment pursuant to F.R.Civ.P. 60. The Court then proceeded to hear plaintiffs' application, treating defendants' papers in support of its motion to alter or amend the judgment as papers in opposition to plaintiffs' application. After careful consideration of the excellent briefs and oral argument presented by counsel for both parties, the Court denies plaintiffs' application for an award of attorneys' fees under the EAJA. Plaintiffs are, however, entitled to their costs of this action. 28 U.S.C. § 2412(a).

The EAJA provides that a prevailing party[1] in litigation against the United States or an agency or officer of the United States is entitled to an award of reasonable attorneys' fees "unless the Court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). "After a prevailing party has submitted an application for an award, the burden of proving that a fee award should not be made rests with the Government." H.R. Rep. No. 1418, 96th Cong., 2d Sess. *reprinted in* [1980] U.S. Code Cong. & Ad. News 4984, 5011.

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[1] Defendant concedes that plaintiff Pacifica Foundation is a prevailing party within the meaning of the EAJA. Because the Court has determined that an award of attorneys' fees is not appropriate in this case, the Court does not need to address the more difficult question of whether plaintiff Henry Waxman and/or plaintiff League of Women Voters is a prevailing party.

Plaintiffs succeeded in this litigation in establishing that a federal statute, 47 U.S.C. § 399,[2] was unconstitutional on its face. Although, as will be discussed fully below, defendant did not oppose plaintiffs throughout much of this litigation, defendant argues that even if it had vigorously defended the constitutionality of § 399 its position would have been "substantially justified" as a matter of law. That is, defendant contends that as a threshold "matter of law, an Executive agency is [substantially] justified in defending an act of Congress against Constitutional challenge." (Defendant's Memorandum of Points and Authorities in Support of Motion to Alter or Amend lines 14-16.) In support of this argument defendant notes that there is usually a strong presumption in favor of the constitutional validity of congressional action. Defendant further argues that "it is inconceivable that Congress itself intended for attorneys' fees to be assessed against an Executive agency that has done nothing more or less than [defend the constitutionality of statutes enacted by Congress.]" (Defendant's Memorandum, page 11, lines 24-27.)

Although it is certainly true that defense of a congressional statute from constitutional challenge will usually be substantially justified, the Court rejects defendant's argument that this is true as a matter of law. The language of the EAJA is clear: it applies to "any civil action [other than cases sounding in tort]." 28 U.S.C. § 2412(d)(1)(A). There is nothing in the statute itself or in its legislative history to support defendant's argument that attorneys' fees

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[2] See *League of Women Voters, supra*, 577 F.Supp. at 381 n.2, for a discussion of the changes in the designation of this statute during the course of the litigation.

cannot be awarded in cases involving a constitutional challenge to a federal statute.[8]

The Court must, therefore, turn to the facts of this case to determine whether an award of attorneys' fees is warranted. The complex procedural history of this case has been set forth at length in the Court's order granting summary judgment. *League of Women Voters, supra,* 547 F.Supp. 380-383. However, a summary of this history will be useful here.

This action for declaratory relief was filed on April 30, 1979. The original complaint challenged two restrictions imposed upon noncommercial educational broadcasting stations by 47 U.S.C. § 399. Under this statute noncommercial educational broadcasting stations were prohibited both from editorializing and from supporting or opposing candidates for political office. Plaintiffs contended that these prohibitions violated the First and Fifth Amendments. Defendant answered on July 30, 1979 alleging that plaintiffs were not entitled to the relief sought. An amended complaint was filed by stipulation of the parties on August 28, 1979 making a minor correction in the language of the original complaint. On September 12, 1979 defendant answered the amended complaint without significant change from the first answer filed.

The parties agreed that there were no genuine issues of material fact to be resolved that the legal issues raised by the complaint could be resolved by motion for summary judgment. Plaintiff filed such a motion on September 24, 1979 and noticed it for hearing on November 5, 1979. On October 22, 1979 the

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[8] The Court notes, further, that the presumption in favor of constitutionality noted by defendants is reversed in some cases, in particular, in cases such as the present one. *See League of Women Voters, supra,* 547 F.Supp. at 384.

parties submitted a stipulation continuing the hearing of this motion on the grounds that

> "[t]he attorney for the defendant, the United States Department of Justice, has determined to discontinue its defense of the constitutionality of [§ 399] . . . and has so advised both Houses of Congress. An extension of time is required to enable the Congress to consider the matter, and to take such action within its power with regard to this case as it may deem proper."

Thereafter, the Senate, represented by its own counsel, sought leave to appear as *amicus curiae* and requested permission to file a motion to dismiss. Plaintiffs filed extensive papers in opposition to the Senate's motion. The Court granted leave for the Senate to appear as *amicus curiae* and permitted the filing of the Senate's motion to dismiss. Noting that there was a distinct likelihood that the defendant would not enforce § 399 and that defendant's counsel had not opposed plaintiff's motion for summary judgment, the Court dismissed the action on the grounds that there was no justiciable case or controversy. The Court, therefore, did not reach plaintiff's motion for summary judgment.

Plaintiffs appealed the order of dismissal. Defendant took no position on the appeal. Approximately one year after the appeal was filed but before the case was heard or a decision rendered, counsel for defendant, under the newly appointed attorney general, changed its position and decided to defend the constitutionality of § 399. The appellate court remanded the action for a determination of the effect of this change on the Court's dismissal. On remand the Court vacated its order of dismissal. The appeal was

subsequently dismissed. The Senate was given leave to withdraw from the litigation.

By order of June 18, 1981, the Court again set plaintiffs' motion for summary judgment on calendar and ordered the parties to file supplemental briefs. Several days before plaintiffs' motion was to be argued to the Court, Congress amended § 399 to limit significantly the statute's ban on editorializing. In light of this change, the Court continued plaintiff's motion, permitted plaintiff to file an amended complaint reflecting the amendment of § 399, and permitted the filing of further supplemental briefs.

On October 2, 1981 plaintiffs filed an amended complaint. In this complaint, however, plaintiffs dropped their challenge to that portion of § 399 which had not been amended (i.e., that portion which prohibited all public broadcasters from supporting or opposing political candidates) and restricted their constitutional challenge to the newly amended and limited ban on editorializing. On this issue plaintiffs' First Amendment challenge was successful.

As indicated above, the EAJA mandates an award of attorneys' fees to the prevailing party in a civil action brought by or against an agency of the United States unless the position of the United States was substantially justified or . . . special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The phrase "substantially justified" has been construed in this and other Circuits to be a reasonableness test. *See Foster v. Tourtellotte*, 704 F.2d 1109, 1111-12 (9th Cir. 1983).

The present case presents an unusual framework for the application of this standard in that the United States was involved both as a party, through defendant FCC, and as *amicus curiae*, through the Senate.

The papers filed by the parties focus primarily on defendant's position in this litigation. This is appropriate in that the position of the Senate was clearly reasonable.

The Senate's role in this litigation was limited to that of *amicus curiae*. As a friend of the Court, the Senate assisted the Court in resolving the difficult question of whether this action presented a justiciable case or controversy. The Senate did not become involved in the merits of plaintiff's constitutional challenge. When it became clear that a justiciable controversy had developed, the Senate withdrew from the litigation. Under these circumstances, the Court concludes that the Senate's position was reasonable and, thus, substantially justified. Therefore, no award of attorneys' fees may be predicated upon the Senate's role in this litigation.

The Court must now consider the reasonableness of the "position of the United States" insofar as defendant FCC is concerned. This is a difficult task under the highly unusual facts of this case.

It is important to note at the outset that this litigation was initiated by plaintiff in an effort to obtain a declaration that § 399 was unconstitutional. The lawsuit was not necessitated by any affirmative action of defendant. Although defendant initially filed an answer denying plaintiffs' entitlement to the relief sought, defendant did not oppose plaintiffs' motion for summary judgment, filed less than five months after the action was commenced. Thus, as soon as the merits of plaintiffs' claims were brought before the Court, defendant conceded the correctness of plaintiffs' legal argument and did everything in its power to assist plaintiffs in obtaining the relief sought. It should be emphasized that defendant had no power to

grant plaintiff the declaratory relief sought. Defendant was faced with an unambiguous federal statute. It was not possible to interpret the clear language of § 399 so as to remedy the perceived constitutional defect. Defendant did not oppose plaintiffs' motion for summary judgment and indicated that it would, in essence, not enforce § 399 should plaintiff Pacifica choose to violate it. It could do no more.

The EAJA is intended "to caution agencies to carefully evaluate their case and not to pursue those which are weak and tenuous." H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980), *reprinted in* [1980] U.S. Code Cong. & Ad. News 4984, 4993. This is precisely what defendant did in this case.

This case is easily distinguished from the cases cited by plaintiffs in which attorneys' fees were awarded despite the fact that the United States conceded the incorrectness of its position early in the litigation. In *United States v. Pomp*, 538 F.Supp. 513 (M.D. Fla. 1982), cited by plaintiff, the action was initiated by the United States to recover a tax penalty and then dismissed when the United States determined that defendant was not liable for the penalty. Clearly this is not apposite to the present case.

Plaintiff also cites *Ocasio v. Schweiker*, 540 F.Supp. 1320 (S.D.N.Y. 1982) and *Photo Data, Inc. v. Sawyer*, 533 F.Supp. 348 (D.D.C. 1982) in support of its argument. In *Ocasio* plaintiff sought to obtain social security benefits which had been unlawfully withheld due to an erroneous interpretation of the relevant statute by the Social Security Administration. After exhausting her administrative remedies, plaintiff sought judicial review. Counel for the government conceded that plaintiff was entitled to the benefits and entered into a stipulation which "corrected the

Agency's interpretation" of the relevant statute. In *Photo Data* the government also settled an action based on allegations of unlawful agency action. In that case a government agency had found that the low bidder on one of its contracts was "nonresponsible" and, therefore, not entitled to the award of a certain contract. The bidder filed suit and the parties shortly thereafter entered into a stipulation pursuant to which the agency rescinded its finding of nonresponsibility.

In both of these cases the award of attorneys' fees was based on a finding that the underlying agency action was not substantially justified, not on a finding that the position of the United States was unreasonable in settling the subsequent litigation. In the present case there is no underlying unreasonable agency action upon which an award of attorneys' fees could be predicated.[4]

The Court concludes that because defendant did not initially oppose plaintiff in any substantial manner

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[4] The Court notes in addition that there is some question as to the correctness of the analysis followed in these cases. It is not yet clearly established whether "the position of the United States" refers solely to the post-complaint stage or whether the pre-complaint stage may also be considered. *See Goldhaber v. Foley*, 698 F.2d 193, 196 (3d Cir. 1983); *Broad Avenue Laundry and Tailoring v. United States*, 693 F.2d 1387, 1390-91 (Cir. Fed. 1982); *Environmental Defense Fund, Inc. v. Watt*, 554 F.Supp. 36, 40-41 (E.D.N.Y. 1982). The court in *Environmental Defense Fund, supra*, noted that "where the government settle[s] a case shortly after it [is] initiated, the difference [between the "post-complaint only" and the "pre- or post-complaint" approach] may prove to be critical." *Id.*, 554 F.Supp. at 40. The present case clearly can involve only the post-complaint stage insomuch as plaintiff filed the complaint prior to any action by defendant.

the "position of the United States" in the initial stages of this litigation was reasonable and, therefore, substantially justified.

As indicated above, plaintiff appealed this Court's order terminating the initial phase of this litigation. Consistent with its earlier stance, defendant took no position on appeal. This "position" was also reasonable. This stage of the litigation was begun and maintained solely due to plaintiffs' desire to obtain a judicial declaration of the statute's unconstitutionality. This relief could not have been provided by defendant.

Of course, as plaintiffs emphasize, defendant changed its position approximately one year later, under the new attorney general, and decided to defend the constitutionality of § 399. This change in position must be viewed, however, in light of the subsequent amendment of § 399 and the limitation of the scope of this litigation by plaintiffs shortly thereafter.

As discussed above, Congress amended § 399 less than four months after defendant changed its position with respect to § 399. The new statute, which defendant continued to defend, was apparently a Congressional attempt to remedy the perceived constitutional defect in § 399's ban on editorializing. Plaintiffs then amended their complaint to focus their attack solely on the amended portion of § 399. Thus, the dispute on which plaintiffs ultimately prevailed and the statute which defendant ultimately defended were quite different from those which were at issue when this litigation began.

The Court finds that defendant's defense of plaintiffs' limited challenge to the amended § 399 was also reasonable. The amendment of the statute was ap-

parently intended as an effort to remedy the perceived constitutional defect in the statute. It was reasonable for defendant to seek a judicial determination as to whether this effort had been successful. The standard of substantial justification does not require defendant to show that it had a substantial probability of prevailing on the defense. H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980), *reprinted in* [1980] U.S. Code Cong. & Ad. News 4984, 4990. Defendant is only required to show that the decision to defend the statute served some legitimate, reasonable ends. The Court concludes that defendant has made such a showing. Plaintiffs' application for attorneys' fees must, therefore, be denied.

The EAJA also permits the Court to decline to award attorneys' fees where "special circumstances would make an award unjust." 28 U.S.C. § 2412(d)(1)(A). It appears that this provision in the Act was intended primarily as a "safety valve" to be used where the government advanced "novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts." H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980), *reprinted in* [1980] U.S. Code Cong. & Ad. News 4984, 4990. It is clear that this rationale would not apply in the present case. However, the legislative history also suggests that this "safety valve" may be used in other circumstances where "equitable considerations dictate an award should not be made." *Id.* The Court has carefully considered all of the facts and circumstances surrounding this unusual litigation. Defendant did not initiate this litigation either directly or indirectly. Defendant did not oppose plaintiffs' motion for summary judgment filed very early in the litigation. Plaintiffs kept the litigation alive by ap-

pealing the Court's order of dismissal. Defendant took a position on appeal. The ultimate defense of plaintiffs' limited challenge to the amended § 399 was reasonable. Under these special circumstances, the Court concludes that an award of attorneys' fees would be unjust. This conclusion provides an alternate basis for the Court's denial of plaintiffs' application for such an award. Plaintiffs shall, however, recover the costs of this action. 28 U.S.C. § 2412(a).

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: July 11, 1983.

/s/ Malcolm M. Lucas
MALCOLM M. LUCAS
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No. CV79-1562-MML Date November 1, 1982

Title League of Women Voters, et al. -v- F.C.C.

PRESENT:

HON. MALCOLM M. LUCAS, JUDGE

Duane Hostetter	Don Mehler
Deputy Clerk	*Court Reporter*
ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
Fredric Woocher	Judith Ledbetter, USDJ

PROCEEDINGS:

Counsel are present. The Court Orders that its previous award of attorney fees is stricken from the judgment. Plaintiffs' opposition to the defendant motion to amend judgment is deemed a motion for attorney fees and the defendant's motion to amend the judgment is deemed the opposition to a motion for attorney fees.

The motion for an award of attorney fees is argued to the Court. The Court takes the motion under submission.

Initials of Deputy Clerk [*illegible*]

APPENDIX E

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

[Filed September 6, 1983]

No. CV 79-1562-MML(PX)

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL., PLAINTIFFS

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Federal Communications Commission, the defendant above-named, hereby appeals to the Supreme Court of the United States from the order entered in this action on August 25, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1252.

Respectfully submitted,

J. PAUL MCGRATH
Assistant Attorney General

ALEXANDER H. WILLIAMS, III
United States Attorney

/s/ Paul Blankenstein
PAUL BLANKENSTEIN

/s/ Merril Hirsh
MERRIL HIRSH

Attorneys, Civil Division
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Washington, D.C. 20530

Attorneys for Defendant.

DATED: August 31, 1983

APPENDIX F

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civ. No. 79-1562 MML (Px)

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL., PLAINTIFFS

v.

FEDERAL COMMUNICATIONS COMMISSION, DEFENDANT

Hearing:

Date: August 15, 1983

Time: 9:30 a.m.

NOTICE OF MOTION AND MOTION TO ALTER AND AMEND ORDER OF JULY 11, 1983 TO AWARD REASONABLE ATTORNEYS' FEES PURSUANT TO 28 U.S.C. § 2412(b)

NOTICE IS HEREBY GIVEN that on August 15, 1983, in the courtroom of the Honorable Malcolm M. Lucas, United States District Judge, United States Courthouse, Los Angeles, California, plaintiffs League of Women Voters of California, et al., will move the Court to alter and amend its July 11, 1983 Order Denying Plaintiffs' Application for an Award of Attorneys' Fees, and to order that plaintiffs are entitled to an award of reasonable attorneys' fees pursuant to 28 U.S.C. § 2412(b). The motion is filed pursuant to Rule 59(e), Fed. R. Civ. P.

This motion is filed to reopen consideration of plaintiffs' application for an award of attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412. Section 2412 provides for awards of fees under two separate subsections, § 2412(d)(1)(A), which requires such an award to a prevailing party against the United States unless the court makes certain findings, and § 2412(b), which makes the United States liable to a prevailing party "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." Plaintiffs originally sought only an award of fees pursaunt to § 2412(d)(1)(A), and this Court has denied the application. However, subsequent to the filing of the original application, another judge of this Court ruled in a case of first impression that plaintiffs were entitled to an

award of fees under § 2412(b) in substantially similar circumstances even when, as here, the Court denied such an award under § 2412(d)(1)(A). *Lauritzen v. Secretary of the Navy*, 546 F.Supp. 1221 (C.D. Cal. 1982) (Tashima, J.), *appeals pending*, 9th Cir. Nos. 82-6020, 6045. It therefore is appropriate to reconsider the original application for fees under § 2412(b).

Dated: July 20, 1983

Respectfully submitted,

FREDERIC D. WOOCHER
LUCAS GUTTENTAG
BILL LANN LEE
MARILYN O. TESAURO
JOHN R. PHILLIPS
Center for Law in the
Public Interest

By /s/ Lucas Guttentag
LUAS GUTTENTAG

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE BY MAIL

I, Sharon Goldman, declare and say:

That I am a citizen of the United States, over the age of eighteen years and not a party to the within-entitled action; that I am employed in the office of an attorney admitted to the Bar of this Court, and that my business address is 10951 W. Pico Boulevard, Los Angeles, California 90064;

That on July 20, 1983, I served the within NOTICE OF MOTION AND MOTION TO ALTER AND AMEND ORDER OF JULY 11, 1983 TO AWARD REASONABLE ATTORNEYS' FEES PURSUANT TO 28 U.S.C. § 2412(b) upon counsel for all parties herein by depositing a copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mailbox at Los Angeles, California, addressed as follows:

J. PAUL McGRATH, Assistant Attorney General
STEPHEN S. TROTT, U.S. Attorney
STEPHEN D. PETERSEN, Ass't U.S. Attorney
1100 United States Courthouse
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PAUL BLANKENSTEIN
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Washington, D.C. 20530

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530

Executed this 20th day of July, 1983 at Los Angeles, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Sharon Goldman
SHARON GOLDMAN

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 417043 93